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No. 92-378

In The

Supreme Court of the United States

October Term, 1992

CURTIS R. VORWALD,

Petitioner,

vs.

SCHOOL DISTRICT OF RIVER FALLS, RIVER FALLS BOARD OF EDUCATION and CHARLES R. BRENDEN, Superintendent of Schools,

Respondents.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Curtis Vorwald, the petitioner, was terminated from his employment on Septemer 18, 1988, following the third of a series of back injuries. Mr. Vorwald had been employed by the School District of River Falls as a custodian for 18 years. The latest back injury occurred in August of 1987. After this injury, various work restrictions were placed upon Mr. Vorwald by his doctors. Those restrictions, among others, included no wet mopping, and no

lifting over 20 pounds (Affidavit of Brenden, R-16, Affidavit of Curtis Vorwald, R-19).[1] After several doctor updates on Mr. Vorwald's condition, it became apparent by September of 1988 that work limitations and restrictions upon him were permanent (R-16). Because of the continuing restrictions, the Personnel Committee of the River Falls School District recommended to the Board that Mr. Vorwald be terminated because he could no longer perform the job of custodian (Affidavit of Healy, R-15).

The undisputed facts in the case before the trial court and the Court of Appeals were that Mr. Vorwald was terminated solely because, in the opinion of the Personnel Committee of the School District of River Falls, he was unable to perform the job of custodian due to the work restrictions that had been placed upon him by his doctors (Affidavits of Brenden and Healy, R-15, R-16).

It is also undisputed that Mr. Vorwald filed a worker's compensation claim based upon the work-related injury which had occurred in August of 1987, and which resulted in permanent work restrictions (R-16, R-21).

It is undisputed that, prior to the meeting wherein Mr. Vorwald was terminated, Charles Brenden, Superintendent of Schools, telephoned Mr. Vorwald and informed him that action on his employment would be taken at the next meeting of the Board. He told Mr. Vorwald that he could be at the meeting, and that he could bring an attorney with him (R-19).

Mr. Vorwald did attend the Board meeting, with his wife, but disputes that he understood what the meeting was to be about (R-19). Thus, for summary judgment purposes, a disputed issue of fact existed with respect to the adequacy of notice and hearing.

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1. "R" hereinafter refers to the record transmitted to the Court of Appeals by the Clerk of the Court for Prince County.

The Board of Education for River Falls has a personnel policy regarding dismissal of non-certified support staff which indicated that prior to dismissal, the Board should provide written notice and an opportunity to be heard (R-18).

Mr. Vorwald, as a custodian, was considered non-certified support staff. There was no other evidence placed before the trial court of any contractual agreement, inplied or otherwise, or collective bargaining agreement between the district and Mr. Vorwald regarding his employment. There was no statutory evidence besides the bare Board Personnel Policy which was presented in support of Mr. Vorwald's claim to a property interest in his employment.

It should be noted that in the Wisconsin Supreme Court, the petitioner specifically relied on the Board policy in and of itself as the grounds for the claimed benefits of continued employment (Respondents' Brief, p. 13).

Mr. Vorwald claimed that he did not receive any notice (R-19) of the meeting wherein his termination was discussed and decided and was deprived of his property interest in employment without due process of law.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD NOT ISSUE BECAUSE THE DECISION IN THE WISCONSIN SUPREME COURT IS CONSISTENT WITH THIS COURT'S RULINGS ON THE SCOPE OF A PROPERTY INTEREST IN EMPLOYMENT.

When approaching a claim of procedural due process deprivation, the court engages in a two-step inquiry. First, the court

asks whether there exists a liberty or property interest which has been interfered with by the State (*Kentucky Department of Corrections v. Thompson,* 109 S. Ct. 1904, 1908, 490 U.S. 454 (1989), *citing Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S. Ct. 2701, 2706, 33 L. Ed. 2d 548 (1972). The second question examines whether the procedures attendant upon the deprivation were constitutionally sufficient (*Kentucky, supra* at 1908, *citing Hewitt v. Helms*, 459 U.S. 460, 472, 103 S. Ct. 864, 871, 74 L. Ed. 2d 675 (1983)). In this case, the court did not reach the second question because it determined that no facts were presented by the petitioner which showed the existence of the requisite property interest in employment.

The types of interest that constitute property for Fourteenth Amendment purposes are not unlimited; an individual claiming a protected interest must have a legitimate claim of entitlement to it. The sufficiency of a claim of entitlement to a property interest in public employment must be decided by reference to state law. (*Bishop v. Wood*, 96 S. Ct. 2074, 2077, 416 U.S. 341, 344, 48 L. Ed. 684 (1976)).

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548.

Vorwald argued that he had a property interest in his employment due to the Board's Personnel Policy (Petitioner's Appendix A-27, R-18), which he argued created a contract under *Holloway v. K-Mart Corp.*, 113 Wis. 2d 143, 334 N.W. 2d 570 (Ct.

App. 1983) or provided "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" under *Roth*, 408 U.S. at 577, and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 2700, 33 L. Ed. 2d 570 (1972).

Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment. *Vorwald v. School District of River Falls*, 167 Wis. 2d 549, 557, 482 N.W. 2d 93 (1992), *citing Castelaz v. Milwaukee*, 94 Wis. 2d 513, 520, 289 N.W. 2d 259 (1980); *Adamczyk v. Caladonia*, 52 Wis. 2d 270, 273-74, 190 N.W. 2d 137 (1971), *Hough v. Dane County*, 157 Wis. 2d 32, 40-42, 458 N.W. 2d 543 (Ct. App. 1990).

> A Wisconsin public employee has no reasonable expectation of continued employment "absent civil service regulations or laws, or the protections of a contract or collective bargaining agreement authorized by statute.

Hough, 157 Wis. 2d 37, 40.

In this case, the Wisconsin Supreme Court correctly applied Wisconsin state law in finding that the bare personnel policy, in and of itself, did not create an understanding of continued employment under Wisconsin law. While it is true in Wisconsin that an enforceable contract, express or implied by an employee manual, may in some circumstances abrogate the at-will employment relationship, a manual in and of itself does not create any substantive contractual rights. (*See Ferraro v. Koelsch*, 124 Wis. 2d 154, 157-58, 368 N.W. 2d 666 (1985); *Holloway*, 113 Wis. 2d at 146).

There must be an exchange of promises, and the furnishing of additional consideration by the employee which would serve to bind the employer if an express or implied contract is to abrogate the at-will employment relationship (*Forer v. Sears Roebuck and Company,* 36 Wis. 2d 388, 153 N.W. 2d 587 (1967)). Both implied and express contracts require the element of mutual meetings of the minds and an intention to contract. *Garvey v. Bueler,* 146 Wis. 2d 281, 289, 430 N.W. 2d 616 (Wis. Ct. App. 1988), *citing Theruerkauf v. Sutton*, 102 Wis. 2d 176, 183, 306 N.W. 2d 651, 657 (1981).

The single page of the River Falls School District personnel policy, standing alone, was all that was offered in this case to support a claim to a contract of continued employment. No other evidence of any rules or understandings protecting Vorwald's employment was offered in the proceedings below. The bare policy, alone, does not rise to the level of a contract, implied or otherwise. Therefore, the school district's "common law right to discharge an employee at any time without cause was not limited by its self-imposed policies regarding discharge." *Vorwald*, 167 Wis. 2d 549, 558, *citing Holloway*, 113 Wis. 2d at 146, 334 N.W. 2d 570 (Ct. App. 1983). Where the district had not charged its at-will relationship with Vorwald, he had no constitutionally recognized property interest in employment.

The Wisconsin Supreme Court, in correctly applying Wisconsin law, found that there were no facts on the record which would give rise to a property interest in employment based upon either implied or expressed contract. This reading of Wisconsin law is not in conflict, contrary to petitioner's assertion, with Supreme Court rulings as set forth in *Board of Regents v. Roth* and *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). The Court in *Perry* recognized the possibility of an implied contract of continued employment (*Perry, supra*, 92 S. Ct. 2694, 2700); so does Wisconsin law in *Ferraro* and *Koelsch*. But,

because Mr. Vorwald failed to come forward with any allegation or proof of a mutually explicit understanding implied through conduct or promise, no property interest based on "rules or understandings" was shown. Similarly, in *Perry*, the Court referred to state law to determine the existence of a claim to continued employment:

> If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

Perry, 92 S. Ct. 2694, 2700, footnote 7.

The Wisconsin Supreme Court's decision is in accord with both Wisconsin law and the mandates of this Court.

II.

THE WISCONSIN SUPREME COURT DECISION IN THIS MATTER DOES NOT CONFLICT WITH *FELDER V. CASEY.*

Finally, the petitioner's reference to the case of *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) is inapplicable to this case. *Felder* has no application in this case, which is based on a finding that under Wisconsin law, Vorwald had no property interest in employment. The absence of any property interest was based on the absence of any contract, implied or otherwise, which would abrogate the at-will employment relationship. Vorwald presented no facts which would support a finding, under Wisconsin law, of an enforceable expectation of continued employment.

Felder rejected a Wisconsin State Notice of Claim requirement under the Supremacy Clause. The Supremacy Clause

is not an issue at all with respect to state-created property interests, which are the necessary prerequisites to the federal claim to procedural due process. The Wisconsin Supreme Court's decision in this case was not contrary to the mandate set forth in *Felder v. Casey*.

CONCLUSION

A writ of certiorari should not issue to review the judgment and opinion of the Wisconsin Supreme Court, where that opinion correctly applies Wisconsin law to the facts set forth in the record, Wisconsin law is not in conflict with Supreme Court rulings on the issue of the existence of a property interest in public employment.

Respectfully submitted,

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